

Merit Systems Protection Board

§ 1208.11

with the Board alleging that a Federal agency employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with a provision of that chapter (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees). In general, the provisions of chapter 43 of title 38 that apply to Federal employees guarantee various reemployment rights following a period of service in a uniformed service, provided the employee satisfies the requirements for coverage under that chapter. In addition, chapter 43 of title 38 prohibits discrimination based on a person's service—or application or obligation for service—in a uniformed service (38 U.S.C. 4311). This prohibition applies with respect to initial employment, reemployment, retention in employment, promotion, or any benefit of employment.

(b) *VEOA*. Under 5 U.S.C. 3330a, a preference eligible who alleges that a Federal agency has violated his rights under any statute or regulation relating to veterans' preference may file an appeal with the Board, provided that he has satisfied the statutory requirements for first filing a complaint with the Secretary of Labor and allowing the Secretary at least 60 days to attempt to resolve the complaint.

§ 1208.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages) of 5 CFR part 1201 regarding awards of attorney fees to appeals governed by this part.

§ 1208.4 Definitions.

(a) *Appeal*. “Appeal” means a request for review of an agency action (the same meaning as in 5 CFR §1201.4(f)) and includes a “complaint” or “action” as those terms are used in

USERRA (38 U.S.C. 4324) and a “complaint” or “appeal” as those terms are used in VEOA (5 U.S.C. 3330a).

(b) *Preference eligible*. “Preference eligible” is defined in 5 U.S.C. 2108.

(c) *USERRA appeal*. “USERRA appeal” means an appeal filed under 38 U.S.C. 4324, as enacted by the Uniformed Services Employment and Reemployment Rights Act of 1994 (Public Law 103-353), as amended. The term includes an appeal that alleges a violation of a predecessor statutory provision of chapter 43 of title 38, United States Code.

(d) *VEOA appeal*. “VEOA appeal” means an appeal filed under 5 U.S.C. 3330a, as enacted by the Veterans Employment Opportunities Act of 1998 (Public Law 105-339).

Subpart B—USERRA Appeals

§ 1208.11 Choice of procedure under USERRA; exhaustion requirement.

(a) *Choice of procedure*. An appellant may file a USERRA appeal directly with the Board under this subpart or may file a complaint with the Secretary of Labor under 38 U.S.C. 4322.

(b) *Exhaustion requirement*. If an appellant files a complaint with the Secretary of Labor under 38 U.S.C. 4322, the appellant may not file a USERRA appeal with the Board until the Secretary notifies the appellant in accordance with 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint. An appellant who seeks assistance from the Secretary of Labor under 38 U.S.C. 4321 but does not file a complaint with the Secretary under 38 U.S.C. 4322 is not subject to the exhaustion requirement of this paragraph.

(c) *Appeals after exhaustion of Department of Labor procedure*. When an appellant receives notice from the Secretary of Labor in accordance with 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint, the appellant may file a USERRA appeal directly with the Board or may ask the Secretary to refer the complaint to the Special Counsel. If the Special Counsel agrees to represent the appellant, the Special Counsel may file a USERRA appeal directly with the Board. If the Special Counsel does not agree to represent the appellant, the appellant may